

NREPA WETLAND REVISIONS

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Senate Bill 1211 (S-1) as passed by the Senate
Sponsor: Sen. Tom Casperson
House Committee: Michigan Competitiveness
Senate Committee: Natural Resources
Complete to 12-17-18

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 1211 would amend the Natural Resources and Environmental Protection Act (NREPA) to change provisions governing wetlands protection and management. The bill, described in more detail below, would take effect 90 days after it is enacted.

Civil Enforcement Actions

The bill would require that, beginning May 1, 2019, before initiating a civil enforcement action under NREPA, the Department of Environmental Quality (DEQ) or the Department of Natural Resources (DNR) would have to provide the person in writing a list of each specific statute, rule, or permit that the person is alleged to have violated and a statement of the facts constituting the violation, in addition to (as is now required) contacting the person and extending an offer to meet to discuss the potential enforcement action and potential resolution of the issue. The bill would also specify that the relevant department could not initiate a civil enforcement action until after such a meeting had been held or after waiting at least 60 days if a meeting were not held.

However, these provisions would not apply if the civil enforcement action were a civil infraction action or if the relevant department determined that the violation constituted an imminent and substantial danger to the environment or to public health or safety.

Part 301 Definitions

The bill would amend Part 301 (Inland Lakes and Streams) of NREPA to eliminate the currently used term *inland lake or stream* and add separate definitions for both *inland lake* and *stream*, as described below.

Inland Lake

Under current law, an inland lake would mean a natural lake, pond, or impoundment or any other body of water that has definite banks, a bed, and visible evidence of a continued occurrence of water. It does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than five acres.

The bill would require an inland lake to be a permanent artificial or a natural inland lake, pond, or impoundment that has definite banks, a bed, and visible evidence of a continued occurrence of water. An inland lake would also have to be either more than five acres in size or “*waters of the United States*” as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”¹

¹ The referenced provision reads in its entirety: “The term ‘navigable waters’ means the *waters of the United States*, including the territorial seas.”

In addition to excluding the Great Lakes and Lake St. Clair, the following would not be considered an inland lake under the bill:

- A feature used for treating wastewater or storm water.
- Artificial features created in land unregulated by Part 301 of NREPA and used for cooling or storing water, farm or livestock irrigation or watering, log cleaning, swimming, mining or construction activities, or raising fish and other aquatic species.
- An artificially irrigated or flooded area that will revert to dry land if the application of water to that area ceases.

Stream

Under current law, a stream would mean² a river, stream, or creek which may or may not be serving as a drain as defined by the Drain Code of 1956 or any other body of water that has definite banks, a bed, and visible evidence of a continued flow of water.

The bill would define a stream as a permanent artificial or a natural river,³ stream, or creek that either has definite banks, a bed, and a continued flow of water or is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”

The following would not be considered a stream under the bill:

- A storm water or wastewater control feature constructed to convey, treat, or store storm water or wastewater that is created on land unregulated by Part 301 of NREPA.
- A ditch with ephemeral flow that does not flow directly from or through a feature regulated under Part 301 of NREPA.
- An erosional feature, including gullies, rills, and other ephemeral features.
- An artificially irrigated or flooded area that will revert to dry land if the application of water to that area ceases.

Part 303 Definitions

The bill would also revise the definition of *wetland* in Part 303 (Wetlands Protection) of NREPA. Under current law, wetland means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh, and which is any of the following:

- Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.
- Not contiguous to the waterbodies listed above and more than five acres in size.
- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and has five acres or less in size if the DEQ determines that the protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the DEQ has so notified the owner.

The bill would remove the provision above allowing DEQ determination that protection of an area is essential to preserving the natural resources of the state.

² The definitions for “inland lake” and “stream” under current law, as provided above, are derivations from the definition of “inland lake or stream.”

³ The construction “A permanent artificial or a natural lake/river” appears intended to indicate that artificial water bodies, but not natural ones, would need to be permanent.

Under the bill, wetland would mean a land or water feature, commonly referred to as a bog, swamp, or marsh, inundated or saturated by water at a frequency and duration sufficient to support, and that under normal circumstances does support, *hydric soils*, aquatic life, **and a predominance of** wetland vegetation. A wetland would have to be one of the following:

- *Contiguous to* the Great Lakes, Lake St. Clair, or an inland lake or stream.⁴
- More than five acres in size.
- A water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.⁵

The bill would specifically exclude the following from the definition of wetland:

- An artificially irrigated or flooded area that will revert to dry land if the application of water to that area ceases.
- A land or water feature that is expressly excluded from the definition of *waters of the United States* under 40 CFR 230.3.⁶ Among other things, this would exclude from the definition of wetland waste treatment systems, wastewater recycling structures, storm water control features, prior converted cropland, log cleaning ponds, irrigation ponds, stock watering ponds, certain ditches with ephemeral or intermittent flow, groundwater, and erosional features such as gullies or rills.

Hydric soil would mean a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.

Contiguous to would be defined as having a continuous surface water connection or a similar, natural, direct physical connection with the Great Lakes, Lake St. Clair, or an inland lake or stream. A wetland located within 500 feet of the ordinary high-water mark of an inland lake or stream, or within 1,000 feet of the ordinary high-water mark of the Great Lakes or Lake St. Clair, would be considered contiguous to those waterbodies unless there were no surface or groundwater connection.

Civil or Criminal Fines

The bill would amend Parts 301 and 303 to provide that a civil or criminal fine authorized to be imposed for each day of a violation could not be imposed for a day of violation occurring after the commencement of both the enforcement action and negotiations over the enforcement action between the violator and the DEQ or attorney general or prosecuting attorney.

Allowed Wetland Uses

Under current law, except as provided by Part 303 or by a permit issued by the DEQ, a person cannot construct, operate, or maintain any use or development in a wetland. The bill would delete the underlined words in several places where the phrase occurs.

Currently, a permit is not required under NREPA for certain wetland uses, including the construction or maintenance of farm roads, forest roads, or temporary roads for moving mining

⁴ In several places in Part 303, the bill would appear to use or reference the terms “inland lake” and “stream,” as defined in Part 301, although those definitions do not apply to Part 303. Without the application of those definitions, the bill would appear to have the effect of removing rivers from provisions of Part 303.

⁵ The referenced provision reads in its entirety: “The term ‘navigable waters’ means the *waters of the United States*, including the territorial seas.”

⁶ <https://www.law.cornell.edu/cfr/text/40/230.3>

or forestry equipment, if the roads are constructed and maintained in a manner to ensure that any adverse effect on the wetland will be minimized.

The bill would add that borrow material for the road construction or maintenance must be taken from upland sources whenever feasible if the wetland is a water of the United States.⁷ If the wetland were not a water of the United States, on-site borrow material could be used.

The bill would further direct that, in determining whether adverse effect on a wetland would be minimized, the DEQ must consider cost, existing technology, and logistics in light of overall project purposes.

Reasonable Cause

Under current law, upon reasonable cause or obtaining a search warrant, the DEQ may enter property on which a prohibited wetland activity, or information needed to determine compliance with Part 303, is located. The bill would remove “upon reasonable cause” and provide that the DEQ could enter such property “upon obtaining a search warrant, an administrative warrant issued by the director of the DEQ, or the consent of the person who owns or controls the premises.”

Award of Costs and Fees

Finally, the bill would require, upon stipulation of the parties or motion, the award of costs and fees to a prevailing party other than the state in a civil action or contested case that is brought against the state under Part 303, unless the state demonstrated by clear and convincing evidence that its position was substantially justifiable. However, regardless of whether the state’s position were substantially justifiable, expert professional witness fees would be awarded to a landowner that prevailed on the issue of whether the landowner’s property was wetland.

The bill would take effect 90 days after its enactment.

MCL 324.1511 et al.

FISCAL IMPACT:

It is unclear whether Senate Bill 1211 would affect costs or revenues for the DEQ. Further narrowing the definition of inland lakes, streams, and wetlands may limit the areas subject to permitted regulation, thereby reducing regulatory costs for the department and reducing the corresponding permit revenue. The department is likely to incur additional costs as a result of a requirement to provide individuals with written notice of their alleged permit violations. The bill is unlikely to affect local government costs or revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

⁷ This term is not defined.